UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EIGHT MILE STYLE, LLC, and MARTIN AFFILIATED, LLC,

Plaintiffs,

vs.

APPLE COMPUTER, INC. and AFTERMATH RECORDS d/b/a AFTERMATH ENTERTAINMENT

Defendant.

Case No. 2:07-cv-13164
Hon. Anna Diggs Taylor
Magistrate Judge Donald A. Scheer

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PLAINTIFFS' MOTION TO EXCLUDE LATE PRODUCED DOCUMENTS

Plaintiffs Eight Mile Style, LLC ("Eight Mile") and Martin Affiliated, LLC ("Martin") hereby move this Court for an Order excluding documents produced by Defendants Aftermath Records ("Aftermath") and Apple, Inc. ("Apple") (collectively "Defendants") and relied upon by them in their Revised Motion for Summary Judgment filed July 28, 2008. (Doc. No. 66.) The documents are inadmissible and should be excluded from evidence, including in support of Defendants' Revised Motion for Summary Judgment. The grounds for this Motion are more fully set forth in Plaintiffs' Memorandum in support of this Motion and the Declaration of Richard S. Busch filed contemporaneously herewith.

Respectfully submitted,

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PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION TO EXCLUDE LATE PRODUCED DOCUMENTS

CONCISE STATEMENT OF THE ISSUES PRESENTED

Whether documents produced by Defendants after the close of discovery and relied upon by them in their Revised Motion for Summary Judgment should be excluded under Fed. R. Civ. P. 37(c) as untimely and under the Federal Rules of Evidence as unauthenticated.

Plaintiff's answer: Yes.

CONTROLLING AUTHORITIES

Cases

Dickenson v. Cardiax and Thoracic Surgery of Eastern Tenn.,
388 F.3d 976 (6th Cir. 2004).
Harris v. City of St. Clairsville,
No. 07-3124, 2008 U.S. App. LEXIS 8869 at *14 -*15 (6th Cir. Apr. 17, 2008).
Roberts v. Galen of Va., Inc.,
325 F.3d 776, 782 (6th Cir. 2003).
SPX Corp. v. Bartec, LLC,
No. 06-14888, 2008 U.S. Dist. LEXIS 58883, *26-*27 (E.D. Mich. Aug. 4, 2008).
Vaughn v. City of Lebanon,
No. 99-6670, 18 Fed. Appx. 252, 264, 2001 U.S. App. LEXIS 18935 at *27 (6th Cir. Aug. 16, 2001).

Federal Rules

Fed. R. Civ. P. 26(a)(1).
Fed. R.Civ. P. 37(c).
Fed. R. Civ. P. 56(c).
Fed. R. Civ. P. 56(e).
Fed. R. Evid. 401.
Fed. R. Evid. 402.
Fed. R. Evid. 901.
Fed. R. Evid. 902.

Other Authorities

11 MOORE'S FEDERAL PRACTICE §56.14(2)(c) (James Wm. Moore ed., LexisNexis 2008).
Notes of Advisory Committee on 1993 Amendments to Fed. R. Civ. P. 37(c).

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION TO EXCLUDE LATE PRODUCED DOCUMENTS

Plaintiffs Eight Mile Style, LLC ("Eight Mile") and Martin Affiliated, LLC ("Martin") (collectively "Plaintiffs") hereby move this Court for an Order excluding documents produced by Defendants Aftermath Records ("Aftermath") and Apple, Inc. ("Apple") (collectively "Defendants") and relied upon by them in their Revised Motion for Summary Judgment filed July 28, 2008. (Doc. No. 66.) As shown below, Defendants' documents should be excluded under Fed. R. Civ. P. 37(c) as untimely and under the Federal Rules of Evidence as unauthenticated. The documents are inadmissible and should be excluded from evidence, including in support of Defendants' Revised Motion for Summary Judgment.

I. Procedural Posture of the Case

Defendants originally filed a motion for summary judgment on May 5, 2008, claiming that Defendants had or have valid express or implied licenses to reproduce and distribute Plaintiffs' musical compositions as digital phonorecord deliveries ("DPDs"). (Doc. No. 34.) With that motion Defendants filed Exhibit 9, a declaration of Rand Hoffman (Doc. No. 34-11) with Exhibits A through D, being the March 9, 1998 recording agreement with recording artist Eminem, the March 9, 1998 inducement agreement with Eminem, the September 27, 2000 Novation Agreement assigning F.B.T.'s rights and obligations under the 1998 Agreement to Eminem, and the July 2, 2003 recording agreement with Eminem. The agreements, filed under seal, were not served upon Plaintiffs' lead counsel. (Busch Decl. ¶ 8.) A second declaration by Wenchan Wang, Exhibit 10, also was filed with Exhibits E through G, being sample royalty statements from April 2007 to June 2007 and October 2007 to December 2007 and copies of checks cashed by Eight Mile and Martin Affiliated. (Doc. No.

34-12). These exhibits, filed under seal, likewise were not served on Plaintiffs' lead counsel. (Busch Decl. ¶ 9.)

Well after the June 2, 2008 close of discovery (Doc. No. 46, Order), Defendants filed an Alternative Motion for Summary Judgment on July 21, 2008, claiming that even if Defendants did not have express or implied authorization to reproduce and distribute the compositions, other co-authors of the compositions expressly authorized the uses in question. (Doc. No. 53.) The new filing included a second Rand Hoffman declaration, attaching eight new exhibits comprised of 503 pages, which consisted of recording agreements and joint venture agreements with other artists, co-authors, or producers. (Doc. No. 53-10, Declaration; Doc. Nos. 55-61.) New documents attached as exhibits to the Alternative Motion for Summary Judgment also included, among others, an unauthenticated summary chart of compositions (Exhibit 1a) and purported "licenses" comprised of 396 unauthenticated pages.

Pursuant to Court's Order, Defendants were ordered to file a single, Revised Motion for Summary Judgment by July 28, 2008. (Doc. No. 65, Order.) Defendants incorporated by reference the previously filed documents and then filed an additional eight exhibits, 14-21 (Doc. Nos. 67 through 73), and yet another unauthenticated revised and lengthier Exhibit 1, now referenced as Exhibit 1b. (Doc. No. 66-3.) The new exhibits included a May 23, 2000 Soundtrack Agreement between Eminem and Shady Records for the film *Eight Mile*, the Second Amended Complaint in the *F.B.T. Productions, LLC and Em2M, LLC v. Aftermath Records, et al.* case, the August 20, 1999 Agreement between Interscope Records and Shady Records, the January 1, 2002 Amendment to the August 20, 1999 Agreement between Interscope Records and Shady Records, the October 1, 2002 recording agreement for artist Obie Trice for the film *Eight Mile*, the May 23, 2001 Artist

Inducement Agreement between Obie Trice and Interscope Records, the January 10, 2004 Artist Inducement Agreement between artist Lloyd Banks and Interscope Records, and a mechanical license for a parody of the "Lose Yourself" composition. No additional declarations were filed with the Revised Motion for Summary Judgment authenticating any of the 167 pages of additional exhibits.

As shown below, the documents upon which Defendants rely in their Revised Motion are comprised in large part of documents which were in the possession, custody or control of Defendants but were not produced until well after the close of discovery. It appears Defendants had second thoughts about their chances of success with their first motion for summary judgment, and that they concocted additional theories for which they had failed to produce documents at the proper time. Defendants then produced documents on a piecemeal basis and filed their second, and then revised, motions using these late-produced and largely unauthenticated documents in support of their newly-minted argument.

II. Defendants' Late Produced Documents Should Be Excluded Under Rule 37(c)

"If a party fails to provide information or identify a witness as required by Rule 26(a) or 26(e), the party is not allowed to use that information or witness **to supply evidence on a motion**, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R.Civ. P. 37(c)(1) (emphasis added). This exclusion was specifically added in 1993 to "provide[] strong inducement for disclosure of material that the disclosing party would expect to use as evidence." Notes of Advisory Committee on 1993 Amendments. Further, Initial Disclosures obligate a party to produce "all documents…that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment." Fed. R. Civ. P. 26(a)(1).

A. Defendants failed to produce Rule 26(a)(1) Initial Disclosures

Plaintiffs served Defendants with Rule 26(a)(1) Initial Disclosures on February 12, 2008. (Busch Decl. ¶ 2.) To date, Defendants have not provided Initial Disclosures pursuant to Fed. R. Civ. P. 26(a)(1) to Plaintiffs. (*Id.*) Although parties may stipulate or a court may order that Rule 26(a)(1) Initial Disclosures will not apply in a given case, there has been no such stipulation or Order here. (*Id.*)

Rule 37(c) is also specifically applicable to materials that should have been provided in discovery responses through Rule 26(e). Defendants failed to produce until after the close of discovery over 1,600 pages of documents upon which they now rely in large part in support of their Revised Motion for Summary Judgment. (*Id.* at ¶¶ 15, 16, Ex. G; Doc. No. 66, Mem., Exs. 14, 17-21, Doc. No. 53-3, Hoffman Decl. Ex. 5A-5E.)

B. Plaintiffs made multiple requests for documents

1. Plaintiffs' First Set of Interrogatories

Plaintiffs submitted First Set of Interrogatories to Defendants on February 12, 2008 that specifically requested information relating to facts that support Defendants' affirmative or complete defenses (interrogatory numbers 2 and 8), communications regarding the Eminem Compositions (interrogatory number 3), Defendants' licensing, reproduction, distribution, or sale of Eminem Compositions (interrogatory numbers 16-19), and Defendants' basis for authority to reproduce, license, distribute, or sell the Eminem Compositions (interrogatory numbers 4-7 and 9-10). (Busch Decl. ¶¶ 3-5, Exs. A-B.) Plaintiffs received responses to the Interrogatories from both Defendants Aftermath and Apple on March 27, 2008. (*Id.* at ¶ 5, Exs. A, B.) Such requests and responses served to incorporate the very documents that Defendants have produced following the close of discovery. (Busch Decl. ¶ 4.) For example, interrogatory number 4 requests "each and every license or agreement pursuant to which" Universal obtained "authority to license, authorize, or otherwise grant to Apple the right to reproduce, distribute, and sell downloads of sound recordings of the Eminem Compositions through its iTunes Store." (Busch Decl. Exs. A, B.) Defendant Aftermath's response refers Plaintiffs to answers to interrogatory number 2 and Defendant Apple's response refers Plaintiffs to documents produced in discovery. (*Id.*)

2. Plaintiffs' First Set of Requests for Production of Documents

Plaintiffs also submitted Requests for Production of Documents to Defendants on February 12, 2008 that specifically requested documents that support Defendants' affirmative or complete defenses (request number 1), support Defendants' answers to Plaintiffs' First Set of Interrogatories (request number 2), relate to communications regarding the Eminem Compositions (request number 8), relate to licensing, reproduction, distribution, or sale of Eminem Compositions (request numbers 3-7, 9, 12-13, 22-26), and relate to the basis for Defendants' authority to reproduce, sell, license, or distribute the Eminem Compositions (request numbers 10-11). (Busch Decl. ¶¶ 3, 6-7, Exs. C-D.) Plaintiffs received responses to Requests for Production of Documents from both Defendants Aftermath and Apple on March 27, 2008. (*Id.* at ¶ 7, Exs. C, D.) Such requests and responses served to incorporate the very documents that Defendants have produced following the close of discovery. (Busch Decl. ¶ 6.) For example, request number 6 asks for "[e]ach and every license, contract, or agreement for whatever purpose, that have been entered into or issued by [Defendants] and/or executed by any party thereto concerning the Eminem Compositions, for any purpose, including but not limited to the reproduction, distribution, or sale of sound recordings of the Eminem Compositions for digital download, streaming, mastertones, and ringtones." (Busch Decl. Ex. C, D.) Both Defendants Aftermath's and Apple's responses refer Plaintiffs to documents referenced in request numbers 3 and 5. (*Id.*)

3. Plaintiffs continued to request documents

Subsequently, counsel for Plaintiffs and Defendants had several meet and confer sessions discussing document production, interrogatories, and requests for production of documents. (Busch Decl. ¶ 10.) Counsel met via teleconference on April 8, 2008 and April 9, 2008. (*Id.*)

On May 2, 2008, Plaintiffs filed a motion to compel discovery seeking more complete answers to Interrogatory numbers 3, 6, 11, 12, 13, 14, 16, 18, and 19, as well as Request for Production of Documents numbers 6, 7, 13, 14, 16, 19, 22, 25, 26, and 27. (Doc. No. 33, Mtn.) On May 9, 2008, the Court filed an Order setting a hearing to determine the motion to compel and requiring counsel to meet and confer to determine unresolved issues. (Doc. No. 37, Order.) Defendants filed a brief in response to the motion to compel on May 16, 2008. (Doc. No. 40, Resp.)

Counsel for Plaintiffs and Defendants again met on June 10, 2008 and June 19, 2008 to discuss discovery issues. (Busch Decl. ¶ 10.) Following the hearing held on June 12, 2008 (*id.*), the Court filed an Order granting in part Plaintiff's Motion to Compel. (Doc. No. 50, Order.) The Order required Defendants to respond to certain Interrogatories and Requests for Production of Documents by July 3, 2008. (*Id.*)

Subsequently, Plaintiffs received supplemental responses to Interrogatory number 18 and Requests for Production of Documents number 6 from Aftermath on July 8, 2008. (Busch Decl. ¶ 11, Ex. E.) Plaintiffs also received supplemental responses to Interrogatory numbers 6 and 19 from Apple on July 8, 2008. (*Id.* at ¶ 12, Ex. F.)

Counsel for Plaintiffs also had a separate conversation with counsel for Defendants inquiring about producing licenses in discovery. (Busch Decl. ¶ 13.) Counsel for Defendants responded that he did not believe Defendants had any licenses other than what they had already produced but would check and produce additional documents if they located any. (*Id.*) Defendants' counsel additionally stated that Defendants would be relying on the controlled composition clause in the Eminem contract as a license. (*Id.*)

C. Defendants still did not produce until after close of discovery and court-ordered compelled discovery

Discovery in this case closed on June 2, 2008. (*Id.* at ¶ 14; Doc. No. 46, Order.) This Court extended discovery to June 27, 2008 solely for the purpose of conducting depositions. (*Id.*) Although discovery had closed, Defendants continued to produce documents long after the deadline had passed. (*See* Busch Decl. ¶ 16, Ex. G (Summary of late produced documents).)

On June 9, 2008, Defendants produced documents Bates numbered AFT 057459 through AFT 057938 that, according to Defendants' correspondence, supplemented Aftermath's prior production in response to Plaintiffs' requests for production of documents. (Busch Decl. ¶ 17.) Two days later, Defendants produced documents Bates numbered AFT 057939 through AFT 058016, also supplementing Aftermath's prior production in response to Plaintiffs' requests for production of documents. (*Id.*) On June 16, 2008, Defendants produced documents Bates numbered APP 00000001 through APP 00000071. (*Id.*)

On July 8, 2008, Defendants produced documents Bates numbered AFT 058017 through AFT 058447, which includes recording agreements upon which Defendants rely in their Revised Motion, being Doc. Nos. 54, 57, 58, 59, 60 and 61, namely Exhibits 5A, 5C-1, 5C-2, 5D-1, 5D-2 and 5-E to the second Declaration of Rand Hoffman. (*Id.* at ¶ 18; Doc. Nos. 53-10, 54, 57-61.) On July 14, 2008, Defendants produced documents Bates numbered AFT 058448 through AFT 058744, which includes licenses and recording agreements upon which Defendants rely in their Revised Motion, being Doc. Nos. 55, 56, namely Exhibits 5B, 5B-1. (Busch Decl. ¶ 18; Doc. Nos. 53-10, 55-56.) On July 24, 2008, Defendants produced additional documents Bates numbered APP 00000001 through APP 00000046, of which APP00000044-46, being Doc. No. 73, Ex. 21 to the Revised Motion. (Busch Decl. ¶ 18; Doc. No. 73.) The same day, Defendants also produced documents Bates numbered AFT 058745 through AFT 058852, which includes an additional agreement upon which Defendants rely in their Revised Motion, being Doc. No. 67, Exhibit 14 to the Revised Motion. (Busch Decl. ¶ 18; Doc. No. 67.) The next day, Defendants produced documents Bates numbered AFT 058853 through AFT 059012, which includes agreements that Defendants rely on in their Motion, being Doc. Nos. 68, 69, 71 and 72, Exhibits 16, 17, 19 and 20 to the Revised Motion. (Busch Decl. ¶ 18; Doc. Nos. 68-69, 71-72.) Again the following day, Defendants produced documents Bates numbered AFT 059013 through AFT 059016, which includes an agreement upon which Defendants rely in their Motion, being Doc. No. 70, Exhibit 18 to the Revised Motion. (Busch Decl. ¶ 18; Doc. No. 70.)

This mass of documents produced well after discovery deadlines had passed, were within Defendants' possession. Plaintiffs made several attempts to discover this information and documents over several months, beginning with Interrogatory and Requests for Production of Documents requests filed in February. (Busch Decl. ¶ 3.) Defendants' initial nonproduction in response to these requests, followed by a delayed flood of relevant documents to their motion for summary judgment only serves to prejudice Plaintiffs.

D. Defendants' unjustified late production prejudices Plaintiffs

As the non-disclosing party, Defendants have the burden of proving substantial justification or harmlessness. *See Roberts v. Galen of Va., Inc.*, 325 F.3d 776, 782 (6th Cir. 2003). Although Plaintiffs are clearly unduly prejudiced by such late production due to their inability to conduct any discovery as to the documents or related witnesses, Plaintiffs, who request exclusion under Rule 37(c)(1), need not even show prejudice. *See SPX Corp. v. Bartec, LLC*, No. 06-14888, 2008 U.S. Dist. LEXIS 58883, *26-*27 (E.D. Mich. Aug. 4, 2008). The Sixth Circuit has interpreted Rule 37(c) as requiring the "automatic and mandatory [exclusion of non-disclosed evidence] unless non-disclosure was justified or harmless." *See Dickenson v. Cardiax and Thoracic Surgery of Eastern Tenn.*, 388 F.3d 976, 983 (6th Cir. 2004) (quoting *Musser v. Gentiva Health Servs.*, 356 F.3d 751, 758 (7th Cir. 2004)).

A "harmless" failure to disclose typically only occurs where the party made an honest mistake concerning the need to disclose and the opposing party had knowledge of the undisclosed information regardless. *See, e.g., id.* at 783 (harmless where opposing party knew the identity of the expert and the subject matter he would testify concerning); *see also Vaughn v. City of Lebanon*, No. 99-6670, 18 Fed. Appx. 252, 264, 2001 U.S. App. LEXIS 18935 at *27

(6th Cir. Aug. 16, 2001) (noting that commentary to Rule 37(c)(1) "'strongly suggests that [a] 'harmless' [violation] involves an honest mistake on the part of a party coupled with sufficient knowledge on the part of the other party'" (citation omitted). Plaintiffs had no knowledge of these documents and it can hardly be said that the non-disclosure was an honest mistake.

Defendants have offered no explanation for their untimely production of documents which obviously existed and were within their possession, custody or control well before the close of discovery. (Busch Decl. ¶ 16.) These are Defendants' own documents and bear dates indicating they were created years ago. As a result of this late production, Plaintiffs are unable to question any witnesses with respect to the documents which Defendants clearly consider important, daresay dispositive; instead, Plaintiffs are forced to respond to this dispositive Motion without the benefit of full discovery. As a result, and due to the lack of justification of Defendants for this late production (Busch Decl. ¶ 19) and the clear prejudice suffered by Plaintiffs, all belatedly produced documents must be excluded, including for purposes of Defendants' Revised Motion for Summary Judgment.

III. Defendants' Documents Should Be Excluded As Unauthenticated Evidence

Defendants attach several exhibits as proof in support of their Revised Motion for Summary Judgment, but Exhibits 1a, 1b, 6 through 10, 12, 14 and 16 through 21 are not authenticated in any manner, and therefore, are inadmissible as evidence. Documents submitted as evidentiary support for a summary judgment motion must be admissible and properly authenticated. 11 MOORE'S FEDERAL PRACTICE §56.14(2)(c) (James Wm. Moore ed., LexisNexis 2008); *see Harris v. City of St. Clairsville*, No. 07-3124, 2008 U.S. App. LEXIS 8869 at *14 -*15 (6th Cir. Apr. 17, 2008) (affirming district court's decision to strike unauthenticated exhibits supporting a summary judgment motion). Unauthenticated exhibits offered in support of a summary judgment motion, such as Defendants' exhibits, are inadmissible.

In filing a summary judgment motion, a moving party must also file supporting affidavits with the motion. Fed. R. Civ. P. 56(c). Such affidavits "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated." Fed. R. Civ. P. 56(e). If specific documents are referred to in the affidavit, they must be "sworn, or certified" and attached to the affidavit. *Id.*

Defendants neither submitted an affidavit or declaration authenticating the exhibits nor are the documents self-authenticating. Acceptable evidence submitted as proof for summary judgment must be admissible as if in trial. Evidence must be relevant (Fed. R. Evid. 401) and admissible (Fed. R. Evid. 402). Documents presented as evidence must be authenticated pursuant to either Fed. R. Evid. 901 or Fed. R. Evid. 902. If the document is submitted as a business record, it must be authenticated through an affidavit or declaration. Fed. R. Evid. 902(11). Some documents are self-authenticating and do not require an affidavit under Fed. R. Evid. 902, including but not limited to public records under seal, official publications, and commercial paper, none of which are applicable in this case.

Defendants have not submitted any affidavit or declaration authenticating the documents or attesting to the source and accuracy of the documents in the specified exhibits attached to Defendants' Revised Motion for Summary Judgment. Therefore, the exhibits are inadmissible as evidence.

Accordingly, for the reasons set forth above, Plaintiffs respectfully request that this Court grant its motion to exclude evidence produced by Defendants after close of discovery and relied upon by Defendants in their Revised Motion for Summary Judgment.

Respectfully submitted,

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2008, I electronically filed the Plaintiffs' Motion and supporting Memorandum to Exclude Late Produced Documents and the Declaration of Richard S. Busch with the Clerk of the Court using the ECF system which will send notification of such filing to the ECF Participants.

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